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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	))))	MM Docket No. 92-266

Rate Regulation

OPPOSITION TO NYNEX'S PETITION FOR RECONSIDERATION

Continental Cablevision, Inc. hereby opposes NYNEX's October 4, 1993 Petition for Reconsideration. The Petition is merely a restatement of arguments which have already been analyzed and rejected by the Commission. Because it advances no basis for reconsideration, it should be rejected.

As it did in previously rejected comments, NYNEX argues that rates in systems with "effective competition" is only one of many elements which the Commission should balance in establishing basic service benchmarks. But Congress' directive is explicit: the FCC "shall take into account ... rates for cable systems .. subject to effective competition" as a class. There is no authority to pick and choose among such rates merely to justify a predetermined result. Nor can the statutory definition be dismissed as merely an effort to protect small, rural, or new cable systems from regulatory burdens. Congress knew precisely how to address such systems. It provided the exceptions it deemed necessary in other provisions of rate regulation, must carry, rural cable, and trafficking. 47 U.S.C. §§ 543(i), 534(b)(1)(A), 533(b)(3), 537(c). As the Commission properly held in its Second Report, there is no room for eliminating parts of a clear

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statutory definition in the Cable Act. Second Report and Order, MM Docket No. 92-266, FCC 93-428 at ¶ 127-128 (August 27, 1993) (citing American Civil Liberties Union v. FCC, 823 F.2d 1554, 1569 (D.C. Cir.), cert. denied, 485 U.S. 959 (1987)).

NYNEX further argues with Congress' rationale in exempting below-30% markets from rate regulation. It claims that Prof. Hazlett's study demonstrates that cable systems with even 30% penetration have undue market power. As Continental has previously explained[1], Prof. Hazlett's study is a collection of unscientific anecdotes. He offers up supposed explanations for low penetration in every below-30% system except the lack of market power, to which he has blinded himself. His explanations are premised on anecdote and speculation, are belied by actual demographic data, and are never confirmed with even an attempt at actual market research. Continental's own operations in South Central Los Angeles reflect neither profits nor market share. Continental's operations elsewhere achieve high penetration even when, according to Prof. Hazlett's rationalizations for below 30% markets, the markets are too old, too non-white, too poor, too rural, too theft-ridden, or too small to achieve such penetration. The Commission properly found that no "convincing arguments" had been advanced by NYNEX or others in support of eliminating below-30% markets from the effective competition calculus.

As Continental has previously explained,[2] antitrust law confirms Congress's

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[1]Comments of Continental Cablevision, Inc., MM Docket No. 92-266 at 6-9 (June 17, 1993); Reply Comments of Continental Cablevision, Inc., MM Docket 92-266 at 6-9 (July 2, 1993).

[2]Ibid.

conclusion that systems with less than 30% penetration lack market power. Market share is routinely used as a measure of competition by telecommunications analysts and by courts.[3] Telephone companies nationwide have argued in State PSC's and in court that reduced market share represents effective competition and marketplace rates.[4] The Commission had every reason to conclude that including below-30% markets in the definition of effective competition was consistent with Congress' purpose in checking perceived monopoly power.

NYNEX finally argues that the Commission should remove the below-30% markets from the effective competition calculus because "news reports" indicate that the

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[3]See, e.g., Peter Huber, The Geodesic Network II, §§ 2.68, 4.20, 4.44. "[T]here is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly [or market] power." Phillip Areeda & Donald A. Turner, Antitrust Law ¶ 518.3c at 549 (1978 and 1992 Supp.). Courts across the country have reached similar conclusions regarding industries as diverse as package delivery, health care provision, and liquor sales. See, Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%."), cert. denied, 497 U.S. 1005 (1990); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987) (manufacturer's control of 25%-33% of the market for wine sales within the relevant market did not constitute requisite monopoly power); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (approximately 70%-75% of market share constitutes market power); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981) (market share below 50% is rarely evidence of monopoly power), cert. denied, 454 U.S. 968 (1981). The FCC itself has followed this principle in deregulating MCI and U.S. Sprint. See, e.g., Competitive Carrier Rulemaking (First Report & Order), 85 FCC 2d 1, 28-30 ¶¶ 79-84 (1981) (subsequent history omitted).

[4]See, e.g., United States v. Western Elec. Co., 767 F. Supp. 308, 312 (D.D.C. 1991) ("The Regional Companies . . . contend most notably that they presently lack any market share in the information services market and therefore could not possibly have market power."), aff'd, 993 F.2d 1572 (D.C. Cir. 1993), cert. denied, Consumer Fed'n of Am. v. United States, ____ U.S. ____, 1993 US LEXIS 7283 (1993).

Commission's rate regulation have failed. It is a bit early to write the obituary for this Docket. As the Commission has repeatedly explained in the Second Report and elsewhere, we will learn through surveys and analysis of Form 393 and other rate submissions how well or poorly the initial scheme of benchmarking is working. News reports and polemic are no substitute for careful analysis of empirical results. The Commission rightly concluded in the Second Report that now is the time for caution, not the reckless cutting of cable rates advocated by NYNEX.

For the foregoing reasons, NYNEX's Petition for Reconsideration should be denied.

Respectfully submitted,

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